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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re ASHLEY D., a Minor.

CHARLES E. et al.,
Petitioners and Appellants,
v.
JOHN D.,
Objector and Appellant.

F063686

(Super. Ct. No. S-1501-AT-2989)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Kern County. James L. Compton,
Commissioner.

Ira L. Stoker, for Petitioners and Appellants.

Linda J. Conrad, under appointment by the Court of Appeal, for Objector and
Respondent.

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* Before Levy, Acting P.J., Poochigian, J., and Detjen, J.

INTRODUCTION

John D. is the father of Ashley D., who was under a guardianship with petitioners Charles E. and Debra E. (guardians) since August 2007. Petitioners filed a petition on February 3, 2011 to declare Ashley free from John D.'s parental custody and control pursuant to Family Code sections 7823, 7824 and 7825. After a contested hearing, the court found that it would not be in Ashley's best interests for John D.'s parental rights to be terminated and to end Ashley's visitation with him. On appeal, petitioners contend the court committed reversible error when it failed to take into consideration detriment to Ashley when it denied their petition. We disagree and affirm the judgment.

FACTS AND PROCEEDINGS

On March 28, 2011, guardians filed an amended petition pursuant to Family Code sections 7823, 7824, 7825, and Probate Code section 1516.5, alleging that they had been Ashley's guardians and John D. suffers from physical or mental incapacity due to habitual use of alcohol that renders him unable to care for his child. The petition alleged John D. had multiple arrests and convictions, including several for felonies. The petition sought to terminate John D.'s parental rights.

Investigator Eugene Wood with Family Court Services filed a report on April 22, 2011, and an addendum report on June 10, 2011. Wood's first report was based upon the guardians' original petition which was based on the provisions of Family Code sections 7823, et seq. Ashley was age nine at the time of the report. John D. is Ashley's presumed father.¹ Petitioners are Ashley's relatives and were appointed her guardians on August 21, 2007. Ashley saw her father on weekends and enjoyed those visits.

The guardians reported that Ashley was distraught, reclusive, displayed inappropriate sexual behaviors, and had nightmares when she first stayed with them, but

¹ At the hearing on the petition, John D. testified that he did not have a DNA test.

has improved significantly. John D. had two misdemeanor convictions for drunk driving in 2008 (Veh. Code, § 23152, subd. (a)), inflicting corporal injury on a spouse/cohabitant in 2006 (Pen. Code, § 273.5, subd. (a)), child endangerment in 2003 (Pen. Code, § 273a, subd. (a)), and assault, not using a firearm, in 1994 (Pen. Code, § 245, subd. (a)(1)). Child protective services intervened on behalf of Ashley three times in March and April of 2003.

Wood noted that under Family Code section 7823, subdivision (2), the child must have been a dependent of the juvenile court for one year before the filing of a petition. Ashley was a dependent of the court between June 2003 and December 2004. The guardians' petition was filed over six years after the juvenile court lost jurisdiction over Ashley. Under Family Code section 7824, subdivision (2), the child must have been a dependent of the court one year immediately before the filing of the petition. This provision also does not apply to this case. Finally, John D. does not meet the legal standards of Family Code section 7825, subdivisions (1) and (2) because he was not convicted of any felonies as required by this statute. John D.'s only convictions were for misdemeanors.

Wood's addendum report was filed after the guardians amended their petition pursuant to Probate Code section 1516.5.² Wood noted that although the guardianship

² Unless otherwise designated, all further statutory references are to the Probate Code. Section 1516.5 provides:

“(a) A proceeding to have a child declared free from the custody and control of one or both parents may be brought in accordance with the procedures specified in Part 4 (commencing with Section 7800) of Division 12 of the Family Code within an existing guardianship proceeding, in an adoption action, or in a separate action filed for that purpose, if all of the following requirements are satisfied:

“(1) One or both parents do not have the legal custody of the child.

had been in place for more than two years, John D. had weekend visitations with Ashley beginning in August 2007 for up to four hours each day. John D. had supervised visitation with Ashley for two hours per week in 2008 and in 2009 six hours every other Sunday with half-hour telephone conversations three days a week. In July 2009, John D.'s hours were expanded with relatives being given discretion over the length of weekend and holiday visits.

By late December 2009, John D. could have unsupervised four-hour visitations with Ashley. Overnight visits were permitted after May 1, 2010, as long as John D. had

“(2) The child has been in the physical custody of the guardian for a period of not less than two years.

“(3) The court finds that the child would benefit from being adopted by his or her guardian. In making this determination, the court shall consider all factors relating to the best interest of the child, including, but not limited to, the nature and extent of the relationship between all of the following:

“(A) The child and the birth parent.

“(B) The child and the guardian, including family members of the guardian.

“(C) The child and any siblings or half siblings.

“(b) The court shall appoint a court investigator or other qualified professional to investigate all factors enumerated in subdivision (a). The findings of the investigator or professional regarding those issues shall be included in the written report required pursuant to Section 7851 of the Family Code.

“(c) The rights of the parent, including the rights to notice and counsel provided in Part 4 (commencing with Section 7800) of Division 12 of the Family Code, shall apply to actions brought pursuant to this section.

“(d) This section does not apply to any child who is a dependent of the juvenile court or to any Indian child.”

clean drug and alcohol tests, and was not arrested. By August 2010, John D. was allowed to have Ashley stay overnight with him on weekends.³ According to Wood, John D. attended all court dates set by the probate court, complied with all requirements set by the court, and received expanded visitation rights. Wood concluded that the relationship between John D. and Ashley was sufficiently strong that Ashley would suffer detriment from termination of John D.'s parental rights and the standard for Probate Code section 1516.5 had not been met.

The hearing on the petition was conducted on September 9, 2011. John D. testified that he had lived at his current address since November 2010. Prior to that, he lived in a rehabilitation facility for three months after he obtained a DUI conviction. Prior to entering the facility, John D. lived with an aunt and with his parents. John D. lived with Ashley's mother for a few years before she became pregnant with Ashley and they resided together until 2008.

John D. was incarcerated in 2006 for corporal injury to a spouse or cohabitant. He was also convicted of misdemeanor child endangerment in 2003. John D. and Ashley's mother smoked marijuana on a daily basis.

The child endangerment event occurred when John D. was trying to leave his home with Ashley and Ashley's mother pulled on her leg to keep them in the home. Ashley was barely one year old. John D. was trying to avoid a confrontation with Ashley's mother. John D. and Ashley's mother began to argue again. Ashley suffered a spiral fracture to her femur.

³ Supervised visits were arranged through John D.'s brother, who would receive Ashley from the guardians and oversee John D.'s visits. When visits were unsupervised, John D.'s brother picked Ashley up from the guardians and brought her to John D.'s home.

In 2006, John D. was arrested for making terrorist threats and for committing a first degree burglary against Ashley's mother. A burglary allegation occurred when John D. was trying to move out and was accused by Ashley's mother of breaking into the residence and stealing property.

John D. works as a construction worker, though he was laid off in August 2011. Until then, he worked fairly steadily. John D.'s rate of pay is \$27.29 per hour. John D. pays the \$71 in child support that he was ordered to pay by the court. John D. has been paying child support since 2007. Although John D.'s license was restricted in 2009, he got it reinstated in 2010.

After receiving two DUI convictions in 2008, John D. went into rehabilitation to get himself "clean." The last time he smoked marijuana was in October 2008. In February 2011, John D. sought to have the guardianship terminated. John D. did not have visitations with Ashley since January 2011.⁴ John D. did not know the name of Ashley's teachers. Ashley enjoys throwing a football, going out to eat, going to the park to get wet, and riding horses.

John D. did not attend Ashley's school activities in 2010 because the guardians never called him to inform him about her schooling. John D. explained it was the guardians' responsibility to inform him of things he could attend, but they failed to do so. The guardians were supposed to give Ashley's report card to John D. They did this in 2009, but not in 2010. The guardians also did not inform John D. about Ashley's doctor appointments. John D. understood that there was a court order that he had the right to medical and school records.

⁴ Guardian Charles E. testified that John D. did not have visitation with Ashley after the instant petition was filed.

John D. faithfully exercised visitation with Ashley between August 2007 and February 2011 and described his relationship with Ashley as strong. John D. explained that Ashley “loves me to death” and believed it would hurt her to lose contact with him. Even if the court were to grant the petition, John D. would still want to have a relationship with Ashley. John D. does not have a good relationship with the guardians.

Charles E. testified that Ashley struggled at first in school but was now doing well. Charles E. stated that Ashley had not shown any discernable changes in her behavior as a result of John D. not visiting her, Ashley had not requested to see her father in the previous five or six months, and Ashley was thriving. Charles E. considers himself to be Ashley’s father and he is involved on a daily basis with her. Charles E. did not think it would be harmful to Ashley for her not to see her father.

Ashley’s counsel explained to the court that he had spoken to Ashley and that she had a good understanding of the purpose of the hearing. Ashley told her attorney that “she badly missed her father” and enjoyed spending time with him. Ashley wished to spend more time with father’s family and said it would be very sad if she could not see her father any more. Ashley’s counsel conceded this was a difficult case and believed that father had turned his life around and there was a stable and continuing relationship with Ashley. Counsel represented that Ashley liked the idea of adoption as long as she could see her father. Counsel recognized that these were competing interests and stated his recommendation was not strong one way or another.

The court found that this was not a case where the father had abandoned the child even given the fact that father had issues in his life. The court recited the standards set forth in Probate Code section 1516.5 and took the matter under submission. The court denied the guardians’ amended petition based on the Family Code and also denied the petition based on section 1516.5. The court found that Ashley would benefit from continuing to visit with her father, had not been abandoned by him, and that John D. had

maintained regular visitation with Ashley except for the time after the petition was filed. The court further found that Ashley was in a stable situation with her guardians and father's visitation did not disturb that relationship.

DISCUSSION

The guardians contend that the trial court abused its discretion by failing to take into account Ashley's best interests in denying the petition to free her from her father's parental custody and control. The guardians also argue that the trial court failed to take into account the detriment to Ashley in denying their petition. We disagree.

Our review of the evidence in a section 1516.5 hearing is constrained. We review the record for substantial evidence to support the trial court's ruling. Under this standard, all conflicts in the evidence are resolved in favor of the prevailing party and all legitimate and reasonable inferences are indulged to uphold the judgment. It is the trial court's duty to determine whether the petitioners met their burden of proof and our duty to determine whether there is substantial evidence to support the trial court's findings. (*In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1382 (*Noreen G.*))

The prerequisites to termination of parental rights under section 1516.5 are that after two years of a guardianship, parental rights can be terminated if it is in the child's best interest. The trial court must find that the child would benefit from being adopted by his or her guardian. Evidence of parental unfitness, or that terminating parental rights is the least detrimental alternative for the child, is not required in a section 1516.5 proceeding. In determining the best interests of the child, the trial court must consider all factors, including the circumstances leading to guardianship, the parent's efforts to maintain contact with the child, any exigencies that might hamper those efforts, and other evidence of commitment to parental responsibilities. (*Noreen G., supra*, 181 Cal.App.4th at p. 1383.) Appellate courts apply the abuse of discretion standard when considering a

trial court's decision to terminate parental rights. (*Id.* at pp. 1382-1383; *Adoption of Myah M.* (2011) 201 Cal.App.4th 1518, 1541-1542.)

Applying these principles to the case at bar, we find that there was substantial evidence in the record to support the trial court's findings and judgment. The guardians rely on the evidence showing that John D. had a substance abuse problem and did not meet Ashley's daily needs. The guardians ignore the evidence established through the testimony at the hearing, as well as from the investigator's report, that John D. regularly visited Ashley, called her, and made his child support payment. They also ignore the fact that John D. had recovered from his former substance abuse problem. John D. was acting in a stable and responsible manner during his visits with Ashley. Furthermore, Ashley's counsel represented that Ashley missed her father and his family and did not want her visits with them ended.

The guardians' argument that the court failed to consider detriment to Ashley fails. Such consideration is not legally required of the trial court. (*Noreen G., supra*, 181 Cal.App.4th at p. 1383.) The trial court followed the correct legal standard set forth in section 1516.5 in considering Ashley's best interest. This finding is supported by substantial evidence.

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal, if any.